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SUBJECT: EU TREATY OF LISBON: CHARTER OF FUNDAMENTAL RIGHTS
AND SOCIAL POLICY

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SUMMARY

¶1. With the Treaty of Lisbon (targeted for entry into force in 2009) the EU Charter of Fundamental Rights -- first proclaimed in 2000 as a political declaration -- will become binding and acquire the same legal value as the Treaties without altering the Union's powers. The UK and Poland secured a derogation (an "opt-out") designed to prevent the EU Court of Justice as well as British and Polish courts from assessing that legislation in both countries is not compatible with the Charter. The Treaty of Lisbon also provides a legal framework to maintain and develop achievements in the field of EU social policy. Though the scope of EU policy will not be altered, some adjustments may occur by way of changes in the general objectives, voting rules, an increased emphasis on the "social dialogue," and provisions for keeping the European Parliament better informed.

¶2. This message, building on previous USEU reporting on the Treaty of Lisbon (REFTELS), is the third in a series that is meant to put the forthcoming EU reforms in perspective and to assess their potential impact on our relations with the EU. Other messages will follow that will focus, among other issues, on foreign policy, defense, justice and home affairs, and economic policy. End Summary.

CHARTER BECOMES LEGALLY-BINDING

¶3. The EU Charter of Fundamental Rights was first proclaimed by the EU leaders, the European Commission, and the European Parliament in December 2000 as a political declaration setting out a range of civil, political, economic, and social rights. The drafting of the document was prompted by a 1996 ruling by the EU Court of Justice that the treaties establishing the European Community did not empower the EC as such to accede to the European Convention on Human Rights, despite all member states being signatories to the Convention. In a context also marked by the 50th anniversary of the Universal Declaration of Human Rights, EU leaders in June 1999 concurred that fundamental rights should be consolidated at the EU level and that a "Charter" would make such rights more visible to their citizens.

¶4. As published in 2000 and basically confirmed last year in "Lisbon," the Charter is divided into six sections, dealing with dignity, freedoms, equality, solidarity, citizens' rights, and justice. The Charter appears like a catalogue drawing from the 1950 European Convention on Human Rights, the case-law of the EU Court of Justice, national constitutional traditions, the COE Social Charter and the 1989 Community Charter of Fundamental Social Rights of Workers. The EU compendium differs from the 1950 European Convention on Human Rights (COE text), which relates solely to civil and political rights, by going beyond traditional human rights and addressing modern issues such as bio-ethics and the protection of personal data.

¶5. Not designed to be a legal document, the Charter was given the ambiguous value of a "solemn proclamation." As the text did not get the status of Community law, cases could not be brought solely on the ground of a breach with it. Meanwhile, the Commission continued to press for a Treaty revision to allow the EU as such to accede to the European Convention on Human Rights. The Charter was incorporated -- as part II -- into the draft Constitutional Treaty rejected by French and Dutch voters in 2005. The agreement on the draft "Constitution" made it clear that the Charter, if it were to acquire legal force, would only be binding on the EU institutions and would not limit the competencies of member states under the Treaties.

¶6. The Treaty of Lisbon (ToL) signed in December 2007 no longer contains the text of the Charter but includes a reference to it, whereby the Charter gains legally binding force: "The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights."

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The original (2000) version of the Charter was slightly amended before the Lisbon signing to adjust it to the text that was part of the rejected "Constitution." The amended text was proclaimed and signed by the Presidents of the European Parliament (Pöhl), Commission (Barroso), and European Council (Portuguese PM Socrates) at a plenary session of the EP on December 12, 2007. It was published in the Official Journal of the European Union (number C 303, December 14, 2007).

¶7. The ToL expressly mentions that the Charter of Fundamental Rights will have "the same legal value as the Treaties." (Article 6 TEU). Other provisions specify, sometimes with redundancies, that:

-- The Charter does not extend the field of Union competencies; it establishes no new powers or tasks for the Union; and it does not amend its powers or its tasks such as they are defined in the Treaties;

-- The Charter applies to institutions and Member States only when they are implementing the Union's law;

-- "Fundamental rights, as guaranteed by the European Convention on Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the member states, shall constitute general principles of the Union's law."

UK AND POLAND GET "OPT-OUTS"

¶8. Such limitations were not sufficient guarantees for the British and Polish ToL negotiators. Anxious to "clarify certain aspects of the application of the Charter," both countries secured a Protocol -- by itself having the same legal value as the Treaty -- establishing exceptions ("opt-outs") with regard to the jurisdiction of the EU Court of Justice (ECJ) and of their national courts for the

protection of the rights recognized by the Charter. The Protocol explicitly states that:

-- "The Charter does not extend the ability of Court of Justice of the EU, or any court or tribunal" of the UK or Poland "to find that the laws, regulations or administrative provisions, practices or action by the UK or Poland are inconsistent with the fundamental rights, freedoms, and principles that it reaffirms";

-- "In particular () nothing in Title IV of the Charter creates justiciable rights" applicable to the UK or Poland, except in so far as the UK or Poland has provided for such rights in its national legislation." The provision refers to the section of the Charter concerning social rights such as the information of workers, collective bargaining, the right to strike, protection against dismissal, working conditions, child labor, family life, social security and assistance, health, access to services of general economic interest, protection of the environment and consumers.

-- "To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the UK to the extent that the rights or principles that it contains are recognized in the law or practices of Poland or the UK."

¶9. In the 2007 ToL negotiations, the Polish government then headed by PM Jaroslav Kaczynski aligned itself with British demands. In a unilateral Declaration annexed to the ToL, Poland stated that, having regard to the tradition of social movement of "Solidarity" ("Solidarnosc"), it "fully respects social and labor rights" as established by EU law and the Charter. However, anxious to preserve its anti-abortion legislation, Poland also specified in another unilateral Declaration that the Charter "does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity." Shortly after the mid-October 2007 deal on the new treaty, a newly-establish Polish government hinted it might reconsider the "opt-out." PM Tusk nevertheless decided that his government would not take any decision in this respect pending ratification of the ToL.

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The Irish government, which had initially reserved its right to "opt-out" as well, did not follow up in the final round of the negotiations.

TREATY CHANGES IN SOCIAL POLICY AREA

¶10. Further to the Charter's section on "solidarity" listing a number of rights and principles directly relevant to social policy (para 8), the ToL provides a legal framework to maintain and develop EU social policies in full respect of national prerogatives. Though the scope of EU policy will not be affected, there will be adjustments as follows:

-- EU objectives: A highly competitive social market economy aiming at full employment and social progress, the fight against "social exclusion and discrimination," as well as "social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child" are included among the general objectives of the EU;

-- A new provision compels the Union "in defining and implementing its policies and actions" to take account of a series of "requirements," i.e. the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection

of human health (Article 9 TFEU). Similarly, the Union must take into account the fight against certain types of discrimination on grounds of sex, race or ethnic origin, religion or beliefs, disability, age or sexual orientation (Article 10 TFEU);

-- Matters related to social security rights for workers exercising their freedom of movement within the EU may be subject to qualified majority voting (QMV) rather than unanimity, as is currently the case (Article 42 TFEU). Per Germany's request, a safeguard procedure will allow for referral to the European Council (meaning: veto right) where a Member State considers that a proposal would "affect important aspects of its social security system." Triggering the procedure will suspend the measure proposed by the Commission;

-- The role of the "social partners" at EU level is spotlighted in a new article (136a TFEU), along with the necessity of "taking into account the diversity of national systems." The "Social Summit" (top-level meeting with EU labor and employers' organizations) ahead of the "Spring" European Council is also enshrined in the Treaty. The "social partners" may be given a mandate to transpose Directives based on collective bargaining (a possibility already existing for Directives based on the regular procedure -- i.e. without a collective agreement);

-- The EP must be informed on agreements concluded between the "social partners," which was not the case until now (though the Commission informally conveyed that information to EP), and on actions taken by the Commission to facilitate cooperation between Member States. Such actions may typically involve exchange of best practices, establishment of benchmarks, monitoring and evaluation (Articles 139-140 TFEU).

COMMENT

¶12. Though the ToL gives the Charter the status of a legal instrument, member states took all precautions to limit the scope of its application. According to some EU sources and practitioners, however, the UK and Polish "opt-outs" under "Lisbon" may be subject to future disputes and both countries may face cases and ECJ rulings concerning their compliance with fundamental rights enshrined in the Charter. A Polish citizen denied the right to family regrouping with a same sex partner could invoke the Charter. The UK (and U.S. companies in the UK) may become entangled in legal cases with the ECJ and the Commission over the right to "opt-out" from the 48-hour weekly limit in the EU "Working Time" Directive. Should the British be outvoted in current attempts to remove that "opt-out" from the Directive, the Commission could feel bound to take the UK to the Court, which would put to test the real value of

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the other, more general UK "opt-out" in the Lisbon Protocol.

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